

September 4, 2001

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON APPEAL OF NOTICE AND ORDER

SUBJECT: Department of Development and Environmental Services File No. **E0000506**

**TY RIBERA
TYDICO, INC.
McCANN ENTERPRISES, INC.**
Code Enforcement Appeal

Location: 13013 and 13029 – 136th Avenue Southeast

Appellants: Ty Ribera, Tydico, Inc. and McCann Enterprises, Inc.,
represented by **Mike Spence**
Phillips McCullough Wilson Hill & Fikso, PSC
Market Place Tower, Suite 1130
2025 First Avenue
Seattle, WA 98121-2100
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Intervenors: Cheryl Mosteller, Kathleen Nada-Schrader, et.al.
represented by **Ross Radley**
4100 First Interstate Center
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King County: Department of Development and Environmental Services,
Code Enforcement Section, *represented by*
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DECISION SUMMARY:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	August 15, 2001
Hearing Closed:	August 15, 2001

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

KEY WORDS:

- Nonconforming uses
- Burden of proof

FINDINGS OF FACT:

1. On April 19, 2001 King County Department of Development and Environmental Services issued a second supplemental notice and order to Ty Ribera, McCann Enterprises, Inc. and Tydico, Inc. citing three parcels of property near Renton for illegal construction of a variety of buildings without required permits; placement and occupancy of a mobile home without required permits; change of use from residential to non-residential without required permits; installation of fuel tanks and waste oil tanks without required permits; and the illegal operation of a construction and trade business within the R4 residential zone. Attorney Michael Spence filed a timely appeal of the notice and order on behalf of the Appellants, alleging that the tanks are in the process of obtaining permits and that the remaining items cited are legal non-conforming uses. A group of neighborhood residents represented by Attorney Ross Radley was granted intervenor status based on allegations of adverse impacts to their properties resulting from extension of construction yard operations to the southern-most parcel.
2. The three parcels subject to the notice and order are bounded on the northwest and south sides by the City of Renton. The property lies south of Southeast 128th Street, which is a principal arterial, east of Union Avenue Northeast and west of 138th Avenue Southeast. The three parcels collectively constitute a nominal ten acre tract. The northern five acres of this tract are occupied by Tax Parcel 518210050, which has an approximately ½ acre lot carved out of its southeast corner identified as tax lot 49. Tax lot 51 to the south appears to be a full five acre parcel. A construction staging and storage yard has been operated on the three parcels by Robert McCann and McCann Enterprises, Inc., which business and assets are in the process of being sold to Ty Ribera and Tydico, Inc.

3. It is uncontested that since the adoption in 1958 of King County zoning regulations the three parcels have been zoned for residential use. The parcels were zoned R-7.2 in 1958 and are currently designated R4. The Appellants have not alleged that any conditional or special use permits were ever issued to McCann, Ribera or their corporate entities or predecessors in interest for the conduct of non-residential uses on the properties, or that such permits for the expansion of nonconforming uses were authorized prior to the adoption of Title 21A.
4. As researched by DDES staff relying primarily on Assessor's records and aerial photographs, a variety of residential structures and rural outbuildings were placed on lots 49 and 50 between 1928 and 1985. The records show for lot 50 a residence built in 1928, a detached garage built in 1956, placement of a double-wide mobile home sometime between 1974 and 1978, an addition to the mobile home built between 1978 and 1985, and two detached garage/shop buildings that were either built on the site or moved from another location between 1974 and 1983. Lot 49 has a residence constructed in 1962 and attached garage built between 1968 and 1970, an attached patio constructed between 1968 and 1974, an in-ground covered swimming pool built in 1969 under a permit, and a detached garage built in 1964 with an addition built between 1974 and 1983. Lot 51 has no permanent structures on it. Of these structures, the only one for which a County permit has been located is the swimming pool built in 1969. Staff concedes, however, that the County has destroyed its permit files for years prior to 1970 and has stipulated that the notice and order should be modified to exclude citations for lack of building permits any structures constructed before 1970. Thus, as revised, the buildings requiring construction permit approval include the northern extension of the L-shaped building on lot 49, as well as the garage addition, and on lot 50 the double-wide mobile home, the mobile home addition, a large two-bay garage, and fuel and waste tanks.
5. A detailed history of non-business uses on the three parcels is somewhat more difficult to pin down. In this regard, the most reliable document in existence appears to be Exhibit 20, a 1960 Walker and Associates aerial photograph. This photograph cannot tell us much about the actual uses on the ground, but is capable of defining with some precision the locations on the property that were subject to significant human activity. It appears to be undisputed that Art McCann, Robert McCann's father, started a landscaping and trucking business on lot 50 in about 1952. It is also clear that by 1962 he also owned lot 49. Looking at the 1960 aerial photograph, one discerns a gravel road accessing the northeastern corner of lot 50 and connecting north to Southeast 128th Street at a distance of about 700 feet. Site development is concentrated in about a one-half acre area located at the northeastern corner of lot 50. In that area are the original house, a large parking area, a garage and some smaller outbuildings. In the south central portion of lot 50 is another large shed with smaller structures and perhaps some vehicles and equipment located to the shed's northwest. What appears to be an older agricultural building lies on lot 49, but is not served by any visible access driveway. The entire western one third of lot 50 appears to be in vegetation as is the northern half of the same lot west of the northeast corner complex. Lot 51 appears to be undeveloped and unused except for animal trails that evidence some grazing activity.
6. By 1970 all of lots 49 and 50 had been devoted to business uses. The permanent buildings continued to be concentrated on lot 49 and the eastern half of lot 50. From this base at the northeast corner of the three parcels, the business has pushed outward both to the west and south.

As currently configured, in the northwest corner of the three-lot site is a large soils stockpile with perhaps 20 portable construction units stored to its south along the western site boundary.

The extension of business activities into lot 51 also encompasses primarily storage, featuring stockpiles of items such as pipe, lumber, hose, fencing and the like. A small stockpile of gravel also lies on lot 51 at the southwest corner of the developed area. Nearly all of lots 49 and 50 are covered with impervious surfaces, as is lot 51, except at its southwest extremity.

7. According to the testimony of the intervenors, a major southerward expansion of the construction yard activity appears to have occurred in the early part of 2000 when both noise and visual impacts began to be experienced by residents south of the Appellants' site. This would seem to indicate further southerly expansion of the equipment storage area and more active use of heavy equipment in the southern portion of the site.

CONCLUSIONS:

1. Hearing Examiner Procedural Rule XI.D.8.b requires that "in a proceeding to consider an appeal or challenge to a King County agency's imposition of a penalty or burden on a party or on his/her property, the agency shall be required to present a *prima facie* case based upon competent evidence demonstrating that the legal standard for imposing such burden or penalty has been met". With respect to the alleged absence of required building or siting permits for existing structures, based on permit records and photographs the staff has made a *prima facie* case on lot 50 with respect to the double-wide mobile home, the mobile home addition, the two detached garage/shop buildings and the fuel and waste tanks. On lot 49 a *prima facie* showing has been made as to the northern extension for the L-shaped building.
2. With respect to non-residential uses, staff has made a *prima facie* case in support of upholding the notice and order for the western one third of lot 50 and all of lots 49 and 51. Based on the 1960 aerial photograph, there is no indication of significant commercial activity to be ascribed to any of those locations. Giving the Appellants' the full benefit of the doubt that those portions of lot 50 showing evidence of human activity were all devoted to Art McCann's landscaping and trucking business, the most generous interpretation possible is that such activities extended to the eastern two thirds of lot 50. Appellants have offered no credible evidence supporting extension of commercial uses in 1958 beyond those areas of activity depicted in the 1960 aerial photograph.
3. Even though there is no evidence specifically identifying a business use on lot 49 at the time of zoning code adoption in 1958, the fact that lots 50 and 49 were treated by the McCanns as a single parcel argues for leniency as to the regulatory outcome of this appeal. We conclude, therefore, that for purposes of filing a conditional use permit application to legitimize expansion of non-conforming uses, lots 49 and 50 should be treated as a single parcel, and a conditional use permit that authorizes non-conforming uses to be expanded on lot 50 should also entertain the possibility of expansion onto lot 49 as well. Without such an accommodation, lot 49 may be surrounded on at least two sides by heavy construction activity, undermining its viability as a residential property.

4. Reviewing the terms of the supplemental notice and order issued on April 19, 2001, the Department is entitled to be upheld on those citations relating to structures built or placed on the property after 1970, including mobile homes and waste and fuel tanks; the change of use of a single family residence to office space on lot 49; the operation of a construction and trade business in a R4 zone in violation of code requirements with respect to the western one third of lot 50 and all of lots 49 and 51, including conversion of single-family residences to office space, exceeding the maximum allowable impervious surfaces and the maintenance and repair of construction vehicles and equipment. Conversely, the appeal will be granted with respect to the citation for an in-ground pool with permits and approvals; all siting and building permits for structures in existence prior to 1970; the change of use of a single-family residence to office space on lot 50; and the operation of a construction and trade business in a residential zone, including maintenance and repair of vehicles and equipment, with respect to the eastern two thirds of lot 50.
5. Some specific comment needs to be directed to the arguments raised within the Appellant's brief regarding the proper legal interpretation to be accorded this record. First, as to the Appellants' argument that the County's destruction of building permit records prior to 1970 shifts the burden of proof to staff to establish the absence of earlier business uses at the site, our view is that the existence or non-existence of earlier building permits for residential or rural structures is irrelevant to the question of their ultimate use for commercial activities. As to the actual locations of business uses in 1958, the burden of proof on staff to provide a *prima facie* case is met by the 1960 aerial photo.
6. The Appellants' argument as to the allowable intensification of non-conforming uses has been recognized in this decision to the extent that the areas on lot 50 that were clearly subject to human activity have been treated as devoted entirely to the business use and the major intensification thereof has been accepted. But the migration of commercial uses established in the 1950's to new portions of the site entails the expansion of non-conforming uses, not their intensification. Such expansion can be approved, if at all, only pursuant to a conditional use permit.

DECISION:

The appeal is GRANTED in part and DENIED in part, as specified in the conclusions stated above.

ORDER:

1. Business operations shall terminate on lot 49 and the western one third of lot 50 unless the Appellants submit by December 31, 2001 a complete application for a conditional use permit to expand non-conforming operations thereon. The allowed scope of future business operations shall be determined by the conditional use permit.
2. Business operations shall be terminated on lot 51 by December 31, 2001, notwithstanding the pendency of any conditional use permit application with respect thereto.

3. The Appellants shall submit by December 31, 2001 complete building or siting permit applications to legalize existing structures built or placed after 1970. Issuance of a building or siting permit does not constitute approval of a structure for any use not otherwise permitted by the underlying residential zoning.
4. No penalties shall be incurred if the Appellants meet the deadlines stated above. For any requirement concerning which the Appellants fail to meet the stated deadline, penalties shall be assessed retroactive to the date of this order.

ORDERED this 4th day of September, 2001.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 4th day of September, 2001, to the following parties and interested persons:

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Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE AUGUST 15, 2001 PUBLIC HEARING ON DEPARTMENT OF
DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0000506 – TY
RIBERA/TYDICO, INC.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing and representing the Department were Sheryl Lux and Steve Wright. Participating in the hearing and representing the Appellant was Mike Spence. Representing the intervenors was Ross Radley. Other participants in this hearing were Cheryl Mosteller, Todd Chase, Paul Englehart, Tessie Wong, Dawn Ketterling, Kathleen Schrader and Keith Kihhelmsen.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Staff report to the Hearing Examiner
- Exhibit No. 2 Copy of Notice & Order issued April 19, 2001
- Exhibit No. 3 Copy of Appeal, received May 15, 2001
- Exhibit No. 4 Computer log notes
- Exhibit No. 5 Copy of King County and UBC Codes cited in Exhibit 2
- Exhibit No. 6 Copy of SIC Manual Codes cited in Exhibit 2
- Exhibit No. 7 Copy of UFC Codes cited in Exhibit 2
- Exhibit No. 8 Copy of 1958 zoning code Section 30 non-conforming uses
- Exhibit No. 9 Copy of 1958 zoning code Section 2.15 definition of non-conforming use
- Exhibit No. 10 Copy of 1958 zoning code Sections 4 & 5 R7.2 residential single-family district
- Exhibit No. 11 GIS area map with parcels and current zoning labeled
- Exhibit No. 12 Copies of aerial photos
- Exhibit No. 13 GIS aerial photos showing orientation of pictures in Exhibit 14
- Exhibit No. 14 Photos taken August 17, 2000 by Sheryl Lux
- Exhibit No. 15 Assessor's information for tax lot 0049
- Exhibit No. 16 Assessor's information for tax lot 0050
- Exhibit No. 17 Assessor's information for tax lot 0051
- Exhibit No. 18 Permit #9587 for pool constructed in 1969
- Exhibit No. 19 Mr. Spence's affidavit collection
- Exhibit No. 20 1960 Aerial photo
- Exhibit No. 21 Sheryl Lux follow-up letter dated September 21, 2000
- Exhibit No. 22 Partial copy of Sheryl Lux Exhibit 4 dated October 3, 2000
- Exhibit No. 23 1960 aerial photos taken by Walker and Associates in Tab 4 of Mr. Radley's notebook
- Exhibit No. 24 1968-1999 aerial photos taken by Walker and Associates in Tab 4 of Mr. Radley's notebook
- Exhibit No. 25 Aerial photos taken in November, 1995; September, 1999; September 2000; January, 2001 in Tab 5 of Mr. Radley's notebook
- Exhibit No. 26 Photos taken from the Schrader's deck; years 2001, 1987-1988, 1990 & 1996 in Tab 6 of Mr. Radley's notebook
- Exhibit No. 27 Photos taken from the Boone and Schrader decks in 1991, 1994 and 2001 in Tab 7 of Mr. Radley's notebook
- Exhibit No. 28 Plan view of plat layout in Tab 14 of Mr. Radley's notebook
- Exhibit No. 29 Letters from neighbors in Tab 1 of Mr. Radley's notebook
- Exhibit No. 30 Noise log written by Ms. Wong in Tab 2 of Mr. Radley's notebook
- Exhibit No. 31 Noise report taken from noise log by Ms. Wong in Tab 3 of Mr. Radley's notebook
- Exhibit No. 32 Video of Tydico Property dated 2000-2001 taken by Ms. Wong